

LRBb1774

## 1999 DRAFTING REQUEST

### Assembly Amendment (AA-ASA1-AB133)

Received: 09/24/1999

Received By: rkite

Wanted: As time permits

Identical to LRB:

For: Charles Chvala (608) 266-9170

By/Representing: Doug Burnett

This file may be shown to any legislator: NO

Drafter: rkite

May Contact:

Alt. Drafters:

Subject: Trade Regulation

Extra Copies: PEN

#### Pre Topic:

No specific pre topic given

#### Topic:

Applicability of fair dealership laws to intoxicating liquor dealerships

#### Instructions:

See Attached

#### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	rkite 09/27/1999	wjackson 09/27/1999	martykr 09/27/1999 martykr 09/28/1999	_____ _____ _____ _____	lrb_docadmin 09/27/1999 lrb_docadmin 09/28/1999	lrb_docadmin 09/28/1999	
/2	rkite 09/30/1999	chanaman 09/30/1999	mclark 09/30/1999	_____ _____	lrb_docadmin 09/30/1999	lrb_docadmin 09/30/1999	

FE Sent For:

<END>

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LRBb1843

09/28/1999 03:05:33 PM

Page 1

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FE Sent For:

*cmh*  
9/28  
1/2

*MRC*  
9/30

&lt;END&gt;

*requested stripes*  
on 09-29-99  
RNF

**1999 DRAFTING REQUEST**

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See Attached

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FE Sent For:

<END>



State Senator  
**Chuck Chvala**  
SENATE MAJORITY LEADER

9.23.99

To: Paul Nelson

From: Doug Burnett

AN ACT to create 135.066 of the statutes; relating to: dealerships between intoxicating liquor wholesalers and grantors.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. 135.066 of the statutes is created to read:

135.066 (1) LEGISLATIVE FINDINGS. The legislature finds that a balanced and healthy <sup>the</sup> three-tier system for the distribution of intoxicating liquor is in the best interest of the state and the citizens of Wisconsin; that the three-tier system for distributing intoxicating liquors has existed in Wisconsin for over 60 years; that the three-tier system ensures a balanced and level playing field between grantor and wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is necessary for a balanced and healthy system; that the number of intoxicating liquor wholesalers in Wisconsin has significantly declined over the past two decades; that this continuing decline threatens the health and stability of the wholesale tier; that this legislation, and its application to all intoxicating liquor dealerships regardless of when

Revised: September 2, 1999

1 they were entered into, is necessary to promote and maintain a wholesale tier  
2 consisting of numerous healthy competitors; and that maintenance and promotion of  
3 the three-tier system by means of this legislation will promote the public health,  
4 safety and welfare. The legislature further finds that a stable and healthy wholesale  
5 tier provides an efficient and effective means for tax collection. The legislature  
6 further finds that dealerships between intoxicating liquor wholesalers and grantors  
7 have been subject to state regulations since the enactment of the 21st Amendment to  
8 the U.S. Constitution and that the parties to those dealerships expect changes to state  
9 legislation regarding those dealerships.

10 135.066 (2) INTOXICATING LIQUOR DEALERSHIP. *offset* Except as provided in  
11 subsection (3), the community of interest element of dealership is satisfied where the  
12 dealer is a wholesaler as defined in s. 125.02 (21) which sells and distributes  
13 intoxicating liquor as defined in s. 125.02(8).

14 135.066 (3) APPLICABILITY. (a) Chapter 135 applies to all intoxicating liquor  
15 dealerships regardless of when they were entered into except to intoxicating liquor  
16 dealerships where:

17 1. The grantor, including any affiliates, divisions or subsidiaries, has  
18 never produced on an annual basis more than 200,000 gallons of intoxicating liquor  
19 as defined in s. 125.02(8); or

20 2a. The intoxicating liquor wholesaler's net sales revenues from all of the  
21 grantor's brands of intoxicating liquor, except for wine as defined in s. 125.02(22),  
22 sold to the intoxicating liquor wholesaler, constitute less than 5% of the wholesaler's

1 total net sales revenues of intoxicating liquor, except for wine, for the wholesaler's  
2 most recent fiscal year preceding the alleged violation of this chapter; and

3 2b. The intoxicating liquor wholesaler's net sales revenues from all of the  
4 grantor's brands of wine sold to the intoxicating liquor wholesaler constitute less than  
5 5% of the wholesaler's total net sales revenues of wine for the wholesaler's most  
6 recent fiscal year preceding the alleged violation of this chapter.

7 2c. For purposes of this subsection, "net sales revenues" means gross dollar  
8 sales less returns, discounts and allowances.

9 (b) The effect of this section may not be varied by contract or agreement.  
10 Any contract or agreement purporting to do so is void and unenforceable to that  
11 extent only. Provisions of a dealership that prevent a wholesaler of intoxicating  
12 liquor, through choice of law or forum provisions, from bringing an action in this  
13 state under ch. 135 are void and unenforceable to that extent only.

14 135.066 (4) CHANGE IN OWNERSHIP. A change in the ownership,  
15 management, or control of an intoxicating liquor wholesaler or of an intoxicating  
16 liquor wholesaler's business is not good cause if the changed ownership or  
17 management or control meets the grantor's reasonable and material qualifications for  
18 wholesaler applicants in effect at the time of the change. In the event an intoxicating  
19 liquor wholesaler transfers its dealership rights to a party who meets the grantor's  
20 reasonable and material qualifications for wholesaler applicants in effect at the time  
21 of transfer, such transferee shall succeed to the transferor's dealership rights and the  
22 grantor shall continue to be bound by the dealership.

1           **135.066 (5) LIABILITY OF TRANSFEEE.** (1) For purposes of this section only,  
2           the following definitions apply:

3           (a) "Goodwill" includes use of a trademark, trade name, logotype or other  
4           commercial symbol, and use of a variation of a trademark, trade name, logotype,  
5           advertisement or other commercial symbol.

6           (b) "Transferee" means a person who acquires any asset or activity of a  
7           grantor's business and who uses the goodwill associated with intoxicating liquor of  
8           the grantor.

9           (2) A transferee shall be bound by each of the grantor's dealerships with  
10          the grantor's wholesalers and consequently shall be deemed a grantor for purposes of,  
11          and shall comply with, the requirements of this chapter.

12          **135.066 (6) SEVERABILITY.** If any provision of section 135.066, or the  
13          application of any provision of section 135.066 to a dealership is held invalid, such  
14          invalidity shall not affect other provisions or applications of section 135.066 that can  
15          be given effect without the invalid provision or application and to this end the  
16          provisions of section 135.066 are severable.

17          **SECTION 2. EFFECTIVE DATE.** Section 135.066 is to be applied retroactively  
18          to all intoxicating liquor dealerships regardless of when they were entered into  
19          including any intoxicating liquor dealerships that were terminated or the competitive  
20          circumstances of which were changed within one year prior to the enactment of  
21          section 135.066.  
22



### COMPROMISE LEGISLATION SUMMARY

The compromise legislation creates a new subsection 135.066 to Chapter 135 to the existing Wisconsin Fair Dealership Law ("WFDL"). The new subsection has four key elements:

- (1) Expanded coverage for intoxicating liquor dealerships.
- (2) Provisions relating to change in ownership of the wholesaler.
- (3) Provisions relating to consolidation of suppliers.
- (4) Application to contracts regardless of when they were entered into.

**(1) Expanded coverage for intoxicating liquor dealerships.**

As you know, under the current WFDL, courts have interpreted the community of interest element of a dealership to mean that a product line must constitute a large percentage of a dealer's business. Section 135.066(2) of the compromise legislation provides that the community of interest element is satisfied where the dealer is a wholesaler licensed under Wisconsin law to distribute intoxicating liquor including wine. Under subsection (2), the compromise legislation would provide coverage to all product lines of intoxicating liquor; however, subsection (3) provides two "brightline" exceptions to subsection (2):

(1) For suppliers which produce less than 200,000 gallons (e.g. Wollersheim Winery currently produces \_\_\_ gallons)

(2) For lines which constitute less than 5% of a wholesaler's business (as measured by net sale revenues) of wine or liquor respectively.<sup>1</sup>

**(2) Provisions relating to change in ownership of the wholesaler.**

Subsection (4) provides that a wholesaler can transfer its business to another entity which meets the "...grantor's reasonable and material qualifications for wholesaler's applicants in effect at the time of the change." This provision means that a wholesaler who has spent his or her entire life building a business can receive value for that effort. A grantor cannot arbitrarily deny such a transfer. On the other hand, a wholesaler cannot transfer to anyone that it wants; rather, the transferee must meet the grantor's reasonable requirements as noted above. Similar provisions exist in the auto dealers law at §§ 218.01(3)(a)26. and 218.01(3c).

**(3) Provisions relating to consolidation of suppliers.**

---

<sup>1</sup> It should be noted that the WFDL does not currently exclude such lines; rather, as noted above, courts have interpreted the community of interest requirement to exclude such lines.

Subsubsection (5) provides that a grantor which acquires another grantor's business is bound by the acquired grantor's existing dealerships. The provision protects against a grantor from simply reorganizing (i.e. merger, transfer, etc.) to, in effect, terminate an existing wholesaler. Similar provisions exist in the auto dealer's law at § 218.01(3)(a)17.

**(4) Application to contracts regardless of when they were entered into.**

Subsubsection (3) provides that "[C]hapter 135 applies to all intoxicating liquor dealerships regardless of when they were entered into . . ." This subsubsection is intended to establish that the compromise legislation is to be retroactively applied. It is supported by the legislative findings of subsubsection (1). Section 2 of the compromise legislation further addresses the application of § 135.066. It states:

**EFFECTIVE DATE.** Section 135.066 is to be applied retroactively to all intoxicating liquor dealerships regardless of when they were entered into including any intoxicating liquor dealerships allegedly terminated within one year prior to the enactment of section 135.066.

It makes clear that retroactive application will not "undo" events that occurred over a year prior to its enactment.

Doug Burnett - 9-24-99

draft as budget amendment

- don't apply retroactivity to "transfer" issue
- retroactive; one year before eff. date

today

1999 - 2000 LEGISLATURE

LRB: [initials]  
RNK:cmh:km

61774/1

D-Note

**ASSEMBLY AMENDMENT ,  
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,  
TO 1999 ASSEMBLY BILL 133**

At the locations indicated, amend the substitute amendment as follows:

1. Page 1139, line 11: after that line insert:

~~SECTION 2166b. 135.02 (1) of the statutes is amended to read:~~

~~135.02 (1) "Community of interest" means a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services or, except as provided in s. 135.07 (4), any relationship between the grantor and grantee in which the grantee is an intoxicating liquor wholesaler, as defined in s. 125.02 (21), of the grantor's brands of intoxicating liquor.~~

SECTION 2166e. 135.02 (5m) of the statutes is created to read:

135.02 (5m) "Intoxicating liquor" has the meaning given in s. 125.02 (8).

SECTION 2166L. 135.02 (7) of the statutes is created to read:

Stet. (no change)

~~but does not include "wine" as defined in s. 125.02 (22)~~

1 135.02 (7) "Wine" has the meaning given in s. 125.02 (22).

Insert 2  
2-1  
2 SECTION 2166p. 135.02<sup>7</sup> of the statutes is created to read:

3 135.02<sup>7</sup> (b) Liability of transferee of intoxicating liquor grantor. (1) In this  
4 section:

5 (a) "Goodwill" includes the use of a trademark, trade name, logotype or other  
6 commercial symbol, and the use of a variation of a trademark, trade name, logotype,  
7 advertisement or other commercial symbol.

8 (b) "Transferee" means a person who acquires any asset or activity of a  
9 grantor's intoxicating liquor business and who uses the goodwill associated with the  
10 grantor's brand of intoxicating liquor.

11 (2) A transferee is considered a grantor for the purposes of this chapter and is  
12 considered to have assumed the transferor's dealership with the wholesaler of that  
13 brand.

14 SECTION 2166r. 135.03 of the statutes is renumbered 135.03 (1) and amended  
15 to read:

16 135.03 (1) No Subject to sub. (2), no grantor, directly or through any officer,  
17 agent or employe, may terminate, cancel, fail to renew or substantially change the  
18 competitive circumstances of a dealership agreement without good cause. The  
19 burden of proving good cause is on the grantor.

20 SECTION 2166u. 135.03 (2) of the statutes is created to read:

21 135.03 (2) A change in the ownership or management of an intoxicating liquor  
22 wholesaler, as defined in s. 125.02 (21), is not good cause for a grantor to terminate,  
23 cancel, fail to renew or substantially change the competitive circumstances of its  
24 dealership with that wholesaler if the changed ownership or management meets the

1 grantor's reasonable and material qualifications in effect at the time of the change  
2 for intoxicating liquor dealerships.

3 **SECTION 2166y.** 135.07 (4) of the statutes is created to read:

4 135.07 (4) To a dealership involving the wholesaling of intoxicating liquor if any  
5 of the following apply:

6 (a) The grantor ~~of the dealership~~, including any affiliate, division or subsidiary  
7 of the grantor, has never produced more than 200,000 gallons of intoxicating liquor  
8 in any year.

9 (b) The dealer's net revenues from the sale of the grantor's brands of  
10 intoxicating liquor constitute less than 5% of the dealer's total net revenues from the  
11 sale of intoxicating liquor during the dealer's previous fiscal year and the dealer's net  
12 revenues from the sale of the grantor's brands of wine constitute less than 5% of the  
13 dealer's total net revenues from the sale of wine during the dealer's previous fiscal  
14 year.".

15 (END)

Insert  
3-14 →

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRBb1774/lins

RNK.....

Insert 1-9

renumbered 135.02 (3)  
(Intro.) and

WFO  
please  
change  
component

SECTION 2166b. 135.02 (3) of the statutes is amended to read:

135.02 (3) "Dealership" means a any of the following:

(a) A contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

History: 1973 c. 179; 1977 c. 171; 1983 a. 189; 1993 a. 482.

SECTION 2166c. 135.02 (3) (b) of the statutes is created to read:

135.02 (3) (b) A contract or agreement, either expressed or implied, whether oral or written, between ~~a~~ <sup>an intoxicating liquor</sup> manufacturer, as defined in s. 125.02 (10), <sup>of intoxicating liquor</sup> and a wholesaler by which <sup>(contract or agreement)</sup> a wholesaler is granted the right to sell or distribute intoxicating liquor or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol related to intoxicating liquor.

(END OF INSERT)

Insert 1-11

Abb. 3(B)

SECTION 2166d. 135.02 (5r) of the statutes is created to read:

135.02 (5r) "Net revenues" means the gross dollar amount received from the sale of intoxicating liquor minus <sup>adjustments for</sup> returns, discounts and allowances.

(END OF INSERT)

letter "g"

Insert 3-14

sections 135.02(3) and

#. g

Page 1607, line 22: after that line insert:

Effective  
Date

"(6m) INTOXICATING LIQUOR DEALERSHIPS. The ~~repeal of section 135.02(3) of~~  
~~the statutes, the~~ renumbering and amending of 135.03 of the statutes and the  
creation of sections 135.02 (3b), (5g), (5r) and (7), 135.03 (2) and 135.07 (4) of the  
statutes take effect retroactively to October 1, 1998."

(END OF INSERT)



1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRBb1774/lins  
RNK.....

(B) Insert 2-1

2166n  
SECTION 135.026 of the statutes is created to read:

135.026 **Legislative findings relating to intoxicating liquor dealerships.** The legislature finds that a balanced and healthy ~~three~~ tier system for distributing intoxicating liquor is in the best interest of this state and its citizens; that the ~~three~~ tier system ensures a balanced and level system between the grantor and wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is necessary for a balanced and healthy system; that the number of intoxicating liquor wholesalers in this state is in decline; that this decline threatens the health and stability of the wholesale tier; that the regulation of all intoxicating liquor dealerships is necessary to promote and maintain a wholesale tier consisting of numerous healthy competitors; and that the maintenance and promotion of the ~~three~~ tier system will promote the public health, safety and welfare. The legislature further finds that a stable and healthy wholesale tier provides an efficient and effective means for tax collection. The legislature further finds that dealerships between intoxicating liquor wholesalers and grantors have been subject to state regulation since the enactment of the 21st Amendment to the U.S. Constitution and that the parties to those dealerships expect changes to state legislation regarding those dealerships.

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBb1774/1dn

RNKY:.....

cmH  
J PEN

DATE

1. A court could find this bill unconstitutional in that its retroactive application may impermissibly impair the obligation of contracts in violation of article I, section 10 of the U.S. Constitution and article I, section 12 of the Wisconsin Constitution. A court may make this finding based on the fact that it may impair existing contractual relationships between intoxicating liquor manufacturers and wholesalers.

Furthermore, because certain provisions of this draft are to be applied retroactively, a court might find that they do not comport with due process requirements. These requirements are satisfied if the public interest served by the retroactive application outweighs the private interests that are overturned by it and if that retroactive application is not fundamentally unfair.

While the inclusion of legislative findings in this draft may give a court a basis on which to sustain the constitutionality of the draft, a court could still find the provisions of the draft unconstitutional.

2. Please note that I made some changes to the legislative findings language that you furnished because, in part, I believe that some of that language conflicted with the substantive provisions of the draft.

3. I did not include the provision prohibiting parties from entering into contracts that vary the effect of the provisions created in the draft because this provision exists in current law under s. 135.025 (3).

4. I also did not include the severability language you furnished because that provision exists in current law in s. 990.001 (11).

5. Please note that, under this draft, a transferee succeeds to the interest of a grantor upon the transfer of any asset, no matter how inconsequential, as long as the transferee uses the grantor's goodwill associated with the grantor's brand of intoxicating liquor. Is this consistent with your intent?

6. In proposed s. 135.07 (4) (b), I used sales during the "dealer's previous fiscal year" as the benchmark for determining whether an intoxicating liquor dealership is bound by ch. 135. This determination will then vary from dealer to dealer depending on the individual dealer's fiscal year. You may wish to use the term "year" which, under s. 990.01 (49) in current law means calendar year. This would also then be consistent with s. 135.07 (4) (a), as created in the draft. Alternatively, you may wish to use the term, "the preceding 12 months".

7. The term "allowances" in the definition of "net revenue" created in this draft is vague. You may wish to make the definition of "net revenue" more specific so that this definition does not give rise to litigation on the issue of the meaning of this term.

8. I made the retroactive provisions of the draft retroactive to October 1, 1998 rather than retroactive to one year before the date of the bill's publication. Is this O.K.?

between October 1, 1998,  
and the ~~effective~~ date of  
this amendment is enacted.

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: Robin.Kite@legis.state.wi.us

who terminated his  
"dealership" on, for  
example, January 1, 1999,  
or her

(9) It is not clear to me how retroactively imposing a dealership,  
which the grantor manufacturer may not terminate or cancel  
without good cause, will affect "dealerships" terminated ~~for~~  
example, on January 1, 1999. Presumably, the manufacturer continues  
to sell its brand using a new wholesaler. Yet 2 dealerships  
will be implied under this amendment: one with the current  
wholesaler and one with the ~~terminated~~ wholesaler. The  
manufacturer may not ~~the~~ terminate the existing dealership  
to return it to the prior wholesaler. It seems this draft will  
create a cause of action for improper termination for every  
wholesaler ~~that~~ was terminated since October 1, 1998. Is this  
your intent?

terminated  
on January 1.

- PEN

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBb1774/1dn  
RNK&PPEN:cmh:km

September 28, 1999

1. A court could find this bill unconstitutional in that its retroactive application may impermissibly impair the obligation of contracts in violation of article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution. A court may make this finding based on the fact that it may impair existing contractual relationships between intoxicating liquor manufacturers and wholesalers.

Furthermore, because certain provisions of this draft are to be applied retroactively, a court might find that they do not comport with due process requirements. These requirements are satisfied if the public interest served by the retroactive application outweighs the private interests that are overturned by it and if that retroactive application is not fundamentally unfair.

While the inclusion of legislative findings in this draft may give a court a basis on which to sustain the constitutionality of the draft, a court could still find the provisions of the draft unconstitutional.

2. Please note that I made some changes to the legislative findings language that you furnished because, in part, I believe that some of that language conflicted with the substantive provisions of the draft.

3. I did not include the provision prohibiting parties from entering into contracts that vary the effect of the provisions created in the draft because this provision exists in current law under s. 135.025 (3).

4. I also did not include the severability language you furnished because that provision exists in current law in s. 990.001 (11).

5. Please note that, under this draft, a transferee succeeds to the interest of a grantor upon the transfer of any asset, no matter how inconsequential, as long as the transferee uses the grantor's goodwill associated with the grantor's brand of intoxicating liquor. Is this consistent with your intent?

6. In proposed s. 135.07 (4) (b), I used sales during the "dealer's previous fiscal year" as the benchmark for determining whether an intoxicating liquor dealership is bound by ch. 135. This determination will then vary from dealer to dealer depending on the individual dealer's fiscal year. You may wish to use the term "year" which, under s. 990.01 (49) in current law means calendar year. This would also then be consistent with s. 135.07 (4) (a), as created in the draft. Alternatively, you may wish to use the term, "the preceding 12 months".

7. The term "allowances" in the definition of "net revenue" created in this draft is vague. You may wish to make the definition of "net revenue" more specific so that this definition does not give rise to litigation on the issue of the meaning of this term.

8. I made the retroactive provisions of the draft retroactive to October 1, 1998, rather than retroactive to one year before the date of the bill's publication. Is this O.K.?

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: Robin.Kite@legis.state.wi.us

It is not clear to me how retroactively imposing a dealership, which the grantor manufacturer may not terminate or cancel without good cause, will affect "dealerships" terminated between October 1, 1998, and the date this amendment is enacted. Presumably, the manufacturer who terminated his or her "dealership" on, for example, January 1, 1999, continues to sell its brand using a new wholesaler. Yet 2 dealerships will be implied under this amendment: one with the current wholesaler and one with the wholesaler terminated on January 1. The manufacturer may not terminate the existing dealership to return it to the prior wholesaler. It seems this draft will create a cause of action for improper termination for every wholesaler that was terminated since October 1, 1998. Is this your intent?

Paul E. Nilsen  
Legislative Attorney  
Phone: (608) 261-6926

*from Doug  
Burnett*

## MEMORANDUM

**To:** Senator Charles Chvala

**From:** Eric Petersen, Wisconsin Wine & Spirits Institute

**Date:** September 29, 1999

**Re:** Drafter's Note from the Legislative Reference Bureau LRB 1774//1dn dated September 28, 1999

We have reviewed the LRB draft and have several serious concerns with it. The draft makes several changes to the language that was submitted which dramatically impacts the effect of the originally submitted language. We have attached a revised draft to this memo. The revised draft restores the provisions which we believe are essential to the legislation and attempts to maintain the stylistic changes made by LRB 1774/1dn. (We have attached a draft which shows the changes and a clean draft where the changes are incorporated.) This memo first addresses our major concerns with the LRB draft followed by a response to LRB's itemized issues.

First, the LRB draft changes the means by which the legislation is integrated into existing chapter 135. The submitted draft integrated the legislation into existing chapter 135 by establishing a separate subsection (subsection 135.066) which addresses the unique concerns associated with intoxicating liquor dealerships. The submitted draft did not alter existing chapter 135 in any fashion.

The LRB draft attempts to integrate the legislation by altering certain provisions of chapter 135. For example, the LRB draft alters the definition of "dealership" to create a new intoxicating liquor dealership (Section 2166b). However, the new definition of dealership is limited because it is only applicable to intoxicating liquor manufacturers as defined in § 125.02(10). That definition does not include rectifiers. On the other hand, the submitted language (135.066(2)) was broader in that it applies to all dealerships where the dealer is a wholesaler as defined in s. 125.02(21) and distributes intoxicating liquors as defined in 125.02(8).

Another example of the difficulty associated with LRB's integration concerns the non-applicability sections (Section 2166g). For purposes of applicability, the submitted language required an "intoxicating liquor less wine" to "intoxicating liquor less wine" comparison and a "wine" to "wine" comparison. The LRB language set forth below requires an intoxicating liquor (which by LRB's definition includes wine) to intoxicating liquor (which by LRB's definition includes wine) comparison and a wine to wine comparison:

**MEMORANDUM**

**To:** Senator Charles Chvala  
**From:** Eric Petersen, Wisconsin Wine & Spirits Institute  
**Date:** September 29, 1999  
**Page:** 2

(b) The dealer's net revenues from the sale of the grantor's brands of intoxicating liquor constitute less than 5% of the dealer's total net revenues from the sale of intoxicating liquor during the dealer's previous fiscal year and the dealer's net revenues from the sale of the grantor's brands of wine constitute less than 5% of the dealer's total net revenues from the sale of wine during the dealer's previous fiscal year.

Second, the LRB draft changes the substantive provisions of the submitted draft. The LRB draft alters proposed § 135.066(4) of the submitted draft by eliminating the term "control" and most significantly by eliminating the entire second sentence:

In the event an intoxicating liquor wholesaler transfers its dealership rights to a party who meets the grantor's reasonable and material qualifications for wholesaler applicants in effect at the time of transfer, such transferee shall succeed to the transferor's dealership rights and the grantor shall continue to be bound by the dealership.

Both changes substantially reduce the protection intended by this proposed provision.

Additionally, with regard to proposed § 135.066(5), the LRB draft alters the language of subsection (2) eliminating the language that "...[T]he transferee shall be bound by each of the grantor's dealerships with the grantor's wholesalers and consequently shall be deemed a grantor for purposes of, and shall comply with, the requirements of the chapter." Again, the effect is to reduce the protection intended by the provision.

The remainder of this memo is a response to the numbered items in the LRB Drafters Note.

1. A court could find this bill unconstitutional in that its retroactive application may impermissibly impair the obligation of contracts in violation of article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution. A court may make this finding based on the fact that it may impair existing contractual relationships between intoxicating liquor manufacturers and wholesalers.

Furthermore, because certain provisions of this draft are to be applied retroactively, a court might find that they do not comport with due process requirements. These requirements are satisfied if the public

**MEMORANDUM**

**To:** Senator Charles Chvala  
**From:** Eric Petersen, Wisconsin Wine & Spirits Institute  
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interest served by the retroactive application outweighs the private interests that are overturned by it and if that retroactive application is not fundamentally unfair.

While the inclusion of legislative findings in this draft may give a court a basis on which to sustain the constitutionality of the draft, a court could still find the provisions of the draft unconstitutional.

We believe the submitted legislation is constitutional because it is carefully drawn to maintain and promote a public policy (3-tier system of distributing intoxicating liquor) that has been in existence for over 60 years which is currently being threatened. While it is true that the Wisconsin Supreme Court found retroactive application of the WFDL to be unconstitutional in *Wipperfurth v. U-Haul*, 101 Wis. 2d 586, 304 N.W.2d 757 (1981), it did so because the Legislature failed to provide the necessary support for retroactive application:

There has been no showing that the severe disruption of contractual expectations of these parties was necessary to meet an important social problem. The retroactive application of the dealership law on this existing contract with its established obligations was severe as to substantive rights of the contract not only as to remedy of the parties. Retroactive application here affected vested rights and obligations substantially. The dealership law was not so carefully drawn to show the use of the police power was reasonably necessary and exigent and it served a vital purpose of government to retroactively affect contracts in existence when it was made law. In fact, the equivocating language of sec. 135.025(2)(d), Stats., does not demonstrate the legislative determination of necessity to apply police power retroactively. Therefore, the court holds retroactive application[101 Wis.2d 599] of ch. 135, Stats., is prohibited as unconstitutional by Art. 1, sec. 10 of the United States Constitution.

However, unlike the situation in *Wipperfurth*, here the Legislature has unequivocally stated retroactive application is necessary and explained why it is necessary in its legislative findings.

Moreover, unlike the situation in *Wipperfurth* which affected all types of dealerships, the submitted legislation affects only a very specific and unique type of dealership--the intoxicating liquor dealership. The intoxicating liquor dealership is unique because there is no other industry over which the State has so much regulatory control:



**MEMORANDUM**

**To:** Senator Charles Chvala  
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While the state's vested as they are with general police power, require not specific grant of authority in the federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. *California v. LaRue*, 409 U.S. 109 (1972).

\* \* \*

...indeed, the states have, by virtue of the Twenty-first Amendment broader authority over the liquor business than over any other business. *United Beverage Company of South Bend v. Indiana Alcoholic Beverage Commission*, 760 F.2d 155 (7th Cir. 1985)

\* \* \*

First, we are aware that the states, under the broad sweep of the Twenty-first Amendment, are endowed with 'something more than the normal police power in regulating the sale of liquor in the interests of the public health, safety, morals and general welfare. *Grand Bazaar Liquors v. City of Milwaukee*, 105 Wis.2d 203 (1982).

There is simply no other type of dealership that the State has so actively and thoroughly regulated over the years. The submitted legislation is merely a continuation of that regulation.

2. Please note that I made some changes to the legislative findings language that you furnished because, in part, I believe that some of that language conflicted with the substantive provisions of the draft.

We do not believe that any part of the substantive provisions of the legislative findings conflicted with the draft. We have restored the struck provisions. We have maintained LRB's stylistic changes.

3. I did not include the provision prohibiting parties from entering into contracts that vary the effect of the provisions created in the draft because this provision exists in current law under s. 135.025 (3).

We agree and have deleted the provision.

**MEMORANDUM**

**To:** Senator Charles Chvala  
**From:** Eric Petersen, Wisconsin Wine & Spirits Institute  
**Date:** September 29, 1999  
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4. I also did not include the severability language you furnished because that provision exists in current law in s. 990.001 (11).

We are aware that Wisconsin Statutes (§ 990.001(11)) contain a general severability provision. We are also aware that courts have ignored that general provision in the past and have looked to express severability clauses within specific legislation to determine legislative intent. *See, e.g. Burlington Northern, Inc. v. City of Superior*, 131 Wis. 2d 564, 388 N.W.2d 916 (1986). Given the constitutional issues identified above, an express severability clause is necessary.

5. Please note that, under this draft, a transferee succeeds to the interest of a grantor upon the transfer of any asset, no matter how inconsequential, as long as the transferee uses the grantor's goodwill associated with the grantor's brand of intoxicating liquor. Is this consistent with your intent?

Yes. The intent is to bind a transferee of a grantor's dealership. However, we would note that there are exclusions set forth in other parts of the legislation.

6. In proposed s. 135.07(4) (b), I used sales during the "dealer's previous fiscal year" as the benchmark for determining whether an intoxicating liquor dealership is bound by ch. 135. This determination will then vary from dealer to dealer depending on the individual dealer's fiscal year. You may wish to use the term "year" which, under s. 990.01 (49) in current law means calendar year. This would also then be consistent with s. 135.07 (4) (a), as created in the draft. Alternatively, you may wish to use the term, "the preceding 12 months".

The intent was to use the dealer's most recent fiscal year as the benchmark. We recognize that there may be variations between dealers as to what 12 months constitute a fiscal year.

7. The term "allowances" in the definition of "net revenue" created in this draft is vague. You may wish to make the definition of "net revenue" more specific so that this definition does not give rise to litigation on the issue of the meaning of this term.

We believe the term "allowances" is generally recognized accounting term with a generally accepted meaning and is not vague.

**MEMORANDUM**

**To:** Senator Charles Chvala  
**From:** Eric Petersen, Wisconsin Wine & Spirits Institute  
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8. I made the retroactive provisions of the draft retroactive to October 1, 1998 rather than retroactive to one year before the date of the bill's publication. Is this OK?

The bill applies to all dealerships regardless of when they were entered into; however, given that the statute of limitations under the WFDL is one year, it would only affect a termination or change in competitive circumstances which occurred in the year preceding enactment of the legislation. Accordingly, we do not have a problem with using the October 1, 1998 date and have done so.

It is not clear to me how retroactively imposing a dealership, which the grantor manufacturer may not terminate or cancel without good cause, will affect "dealerships" terminated between October 1, 1998, and the date this amendment is enacted. Presumably, the manufacturer who terminated his or her "dealership" on, for example, January 1, 1999, continues to sell its brand using a new wholesaler. Yet 2 dealerships will be implied under this amendment: one with the current wholesaler and one with the wholesaler terminated on January 1. The manufacturer may not terminate the existing dealership to return it to the prior wholesaler. It seems this draft will create a cause of action for improper termination for every wholesaler that was terminated since October 1, 1998. Is this your intent?

As in the case under the existing WFDL, the newly appointed dealer's rights exist only to the extent that the previous dealer was not improperly terminated. A grantor's termination of a newly appointed dealer pursuant to a court order would surely constitute good cause.

**ASSEMBLY AMENDMENT,  
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,  
TO 1999 ASSEMBLY BILL 133**

At the locations indicated, amend the substitute amendment as follows:

1. Page 1139, line 11: after that line insert:

"Section 2166b. 135.066 of the statutes is created to read:

*DNite*

**135.066 (1) LEGISLATIVE FINDINGS.** The legislature finds that a balanced and healthy three-tier system for distributing of intoxicating liquor is in the best interest of the state and its citizens; that the 3-tier system for distributing intoxicating liquors has existed in Wisconsin for over 60 years; that the 3-tier system ensures a balanced and level system between grantor and wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is necessary for a balanced and healthy system; that the number of intoxicating liquor wholesalers in Wisconsin has significantly declined over the past two decades; that this continuing decline threatens the health and stability of the wholesale tier; that this legislation, and its application to all intoxicating liquor dealerships regardless of when they were entered into, is necessary to promote and maintain a wholesale tier consisting of numerous healthy competitors; and that maintenance and promotion of the 3-tier system by means of this legislation

1 will promote the public health, safety and welfare. The legislature further finds that  
2 a stable and healthy wholesale tier provides an efficient and effective means for tax  
3 collection. The legislature further finds that dealerships between intoxicating liquor  
4 wholesalers and grantors have been subject to state regulation since the enactment of  
5 the 21st Amendment to the U.S. Constitution and that the parties to those dealerships  
6 expect changes to state legislation regarding those dealerships.

7 **135.066 (2) INTOXICATING LIQUOR DEALERSHIP.** Except as provided in  
8 subsection (3), the community of interest element of dealership is satisfied where the  
9 dealer is a wholesaler as defined in s. 125.02 (21) which sells and distributes  
10 intoxicating liquor as defined in s. 125.02(8).

11 **135.066 (3) APPLICABILITY.** (a) Chapter 135 applies to all intoxicating liquor  
12 dealerships regardless of when they were entered into except to intoxicating liquor  
13 dealerships where:

14 1. The grantor, including any affiliates, divisions or subsidiaries, has  
15 never produced more than 200,000 gallons of intoxicating liquor as defined in s.  
16 125.02(8) in any year; or

17 2a. The intoxicating liquor wholesaler's net sales revenues from all of the  
18 grantor's brands of intoxicating liquor, except for wine as defined in s. 125.02(22),  
19 sold to the intoxicating liquor wholesaler, constitute less than 5% of the wholesaler's  
20 total net sales revenues of intoxicating liquor, except for wine, for the wholesaler's  
21 most recent fiscal year preceding the alleged violation of this chapter; and

22 2b. The intoxicating liquor wholesaler's net sales revenues from all of the  
23 grantor's brands of wine sold to the intoxicating liquor wholesaler constitute less than

1 5% of the wholesaler's total net sales revenues of wine for the wholesaler's most  
2 recent fiscal year preceding the alleged violation of this chapter.

3 2c. For purposes of this subsection, "net sales revenues" means gross dollar  
4 sales less returns, discounts and allowances.

5 135.066 (4) CHANGE IN OWNERSHIP. A change in the ownership,  
6 management, or control of an intoxicating liquor wholesaler or of an intoxicating  
7 liquor wholesaler's business is not good cause if the changed ownership or  
8 management or control meets the grantor's reasonable and material qualifications for  
9 wholesaler applicants in effect at the time of the change. In the event an intoxicating  
10 liquor wholesaler transfers its dealership rights to a party who meets the grantor's  
11 reasonable and material qualifications for wholesaler applicants in effect at the time  
12 of transfer, such transferee shall succeed to the transferor's dealership rights and the  
13 grantor shall continue to be bound by the dealership.

14 135.066 (5) LIABILITY OF TRANSFeree. (1) For purposes of this section only,  
15 the following definitions apply:

16 (a) "Goodwill" includes use of a trademark, trade name, logotype or other  
17 commercial symbol, and use of a variation of a trademark, trade name, logotype,  
18 advertisement or other commercial symbol.

19 (b) "Transferee" means a person who acquires any asset or activity of a  
20 grantor's intoxicating liquor business and who uses the goodwill associated with  
21 intoxicating liquor of the grantor.

1           (2)    A transferee shall be bound by each of the grantor's dealerships with  
2           the grantor's wholesalers and consequently shall be deemed a grantor for purposes of,  
3           and shall comply with, the requirements of this chapter.

4           135.066 (6) SEVERABILITY. If any provision of section 135.066, or the  
5           application of any provision of section 135.066 to a dealership is held invalid, such  
6           invalidity shall not affect other provisions or applications of section 135.066 that can  
7           be given effect without the invalid provision or application and to this end the  
8           provisions of section 135.066 are severable.

9           2.    Page 1607, line 22: after that line insert:

10          INTOXICATING LIQUOR DEALERSHIPS. The creation of section 135.066 is to be  
11          applied retroactively to all intoxicating liquor dealerships regardless of when they were  
12          entered into including any intoxicating liquor dealerships that were terminated or the  
13          competitive circumstances of which were changed since October 1, 1998.

14

**ASSEMBLY AMENDMENT,  
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,  
TO 1999 ASSEMBLY BILL 133**

At the locations indicated, amend the substitute amendment as follows:

1. Page 1139, line 11: after that line insert:

"Section 2166b. 135.066 of the statutes is created to read:

135.066 (1) LEGISLATIVE FINDINGS. The legislature finds that a balanced and healthy three-tier system for ~~the distribution~~ distributing of intoxicating liquor is in the best interest of the state and ~~the its citizens of Wisconsin~~; that the ~~three~~3-tier system for distributing intoxicating liquors has existed in Wisconsin for over 60 years; that the ~~three~~3-tier system ensures a balanced and level ~~playing field system~~ between grantor and wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is necessary for a balanced and healthy system; that the number of intoxicating liquor wholesalers in Wisconsin has significantly declined over the past two decades; that this continuing decline threatens the health and stability of the wholesale tier; that this legislation, and its application to all intoxicating liquor dealerships regardless of when they were entered into, is necessary to promote and maintain a wholesale tier consisting of numerous healthy competitors; and that



1 maintenance and promotion of the ~~three~~<sup>3</sup>-tier system by means of this legislation will  
2 promote the public health, safety and welfare. The legislature further finds that a  
3 stable and healthy wholesale tier provides an efficient and effective means for tax  
4 collection. The legislature further finds that dealerships between intoxicating liquor  
5 wholesalers and grantors have been subject to state regulations since the enactment  
6 of the 21st Amendment to the U.S. Constitution and that the parties to those  
7 dealerships expect changes to state legislation regarding those dealerships.

8 135.066 (2) INTOXICATING LIQUOR DEALERSHIP. Except as provided in  
9 subsection (3), the community of interest element of dealership is satisfied where the  
10 dealer is a wholesaler as defined in s. 125.02 (21) which sells and distributes  
11 intoxicating liquor as defined in s. 125.02(8).

12 135.066 (3) APPLICABILITY. (a) Chapter 135 applies to all intoxicating liquor  
13 dealerships regardless of when they were entered into except to intoxicating liquor  
14 dealerships where:

15 1. The grantor, including any affiliates, divisions or subsidiaries, has  
16 never produced ~~on an annual basis~~ more than 200,000 gallons of intoxicating liquor  
17 as defined in s. 125.02(8) in any year; or

18 2a. The intoxicating liquor wholesaler's net sales revenues from all of the  
19 grantor's brands of intoxicating liquor, except for wine as defined in s. 125.02(22),  
20 sold to the intoxicating liquor wholesaler, constitute less than 5% of the wholesaler's  
21 total net sales revenues of intoxicating liquor, except for wine, for the wholesaler's  
22 most recent fiscal year preceding the alleged violation of this chapter; and

1           2b.    The intoxicating liquor wholesaler's net sales revenues from all of the  
2           grantor's brands of wine sold to the intoxicating liquor wholesaler constitute less than  
3           5% of the wholesaler's total net sales revenues of wine for the wholesaler's most  
4           recent fiscal year preceding the alleged violation of this chapter.

5           2c.    For purposes of this subsection, "net sales revenues" means gross dollar  
6           sales less returns, discounts and allowances.

7           ~~(b)    The effect of this section may not be varied by contract or agreement.~~  
8           ~~Any contract or agreement purporting to do so is void and unenforceable to that~~  
9           ~~extent only. Provisions of a dealership that prevent a wholesaler of intoxicating~~  
10          ~~liquor, through choice of law or forum provisions, from bringing an action in this~~  
11          ~~state under ch. 135 are void and unenforceable to that extent only.~~

12          135.066 (4) CHANGE IN OWNERSHIP. A change in the ownership,  
13          management, or control of an intoxicating liquor wholesaler or of an intoxicating  
14          liquor wholesaler's business is not good cause if the changed ownership or  
15          management or control meets the grantor's reasonable and material qualifications for  
16          wholesaler applicants in effect at the time of the change. In the event an intoxicating  
17          liquor wholesaler transfers its dealership rights to a party who meets the grantor's  
18          reasonable and material qualifications for wholesaler applicants in effect at the time  
19          of transfer, such transferee shall succeed to the transferor's dealership rights and the  
20          grantor shall continue to be bound by the dealership.

21          135.066 (5) LIABILITY OF TRANSFeree. (1) For purposes of this section only,  
22          the following definitions apply:

1 (a) "Goodwill" includes use of a trademark, trade name, logotype or other  
2 commercial symbol, and use of a variation of a trademark, trade name, logotype,  
3 advertisement or other commercial symbol.

4 (b) "Transferee" means a person who acquires any asset or activity of a  
5 grantor's intoxicating liquor business and who uses the goodwill associated with  
6 intoxicating liquor of the grantor.

7 (2) A transferee shall be bound by each of the grantor's dealerships with  
8 the grantor's wholesalers and consequently shall be deemed a grantor for purposes of,  
9 and shall comply with, the requirements of this chapter.

10 135.066 (6) SEVERABILITY. If any provision of section 135.066, or the  
11 application of any provision of section 135.066 to a dealership is held invalid, such  
12 invalidity shall not affect other provisions or applications of section 135.066 that can  
13 be given effect without the invalid provision or application and to this end the  
14 provisions of section 135.066 are severable.

15 2. Page 1607, line 22: after that line insert:

16 INTOXICATING LIQUOR DEALERSHIPS. The creation of sSection 135.066 is to be  
17 applied retroactively to all intoxicating liquor dealerships regardless of when they were  
18 entered into including any intoxicating liquor dealerships that were terminated or the  
19 competitive circumstances of which were changed within one year prior to the enactment of  
20 section 135.066 since October 1, 1998.

21

Gordon Brewster Baldwin  
Evjue-Barcom Emeritus Professor of Law

E Mail: gbaldwin@facstaff.wisc.edu  
Office (608) 263-2077  
Home (608) 238-2951  
Fax (608) 262-5485

3958 Plymouth Circle, Madison, WI 53705-5212

September 27, 1999

Governor Tommy G. Thompson  
Room 115 East  
State Capital  
PO Box 7863  
Madison, WI 53707-7863

SEP 28 1999

Dear Governor Thompson,

Last week in a chat with Douglas Johnson I heard of the proposal to amend Wisconsin law in such a way as to give liquor distributors a permanent right to receive products from liquor and wine producers. Douglas asked me for comments on the proposals wisdom, if not legality. Instead I decided to write you these comments which I hope you will find useful.

First, the proposed legislation establishes a monopoly, by giving liquor and wine wholesalers a status with protections not enjoyed by any other wholesale provider. I understand that the proposal helps seven large liquor wholesalers who supply far more than a majority of Wisconsin's retail wine and liquor retailers. New laws should be enacted when problems exist requiring statutory solutions. The notable legislation which your administration has produced result from careful and substantial study. I am aware of no facts which justify this kind of governmental intervention into a market. Ample competition exists among beer and liquor producers, but this proposal removes a level of competition among wholesale distributors. We need very strong public policy justifications to support creating new monopolies.

Second, bills making dramatic changes in supplier, wholesaler and retailer relationships, should not be included in a budget bill. The proposal could have secondary impacts on consumers. At least the interests of consumers ought to be evaluated more carefully than it has been. This proposal does not have immediate budget consequences, and hence ought to receive more public attention and debate.

Third, the proposal fences out others who might wish to enter the wholesale wine and liquor business. I understand some supporters argue that the proposal helps family businesses. Doubtless, but helping a family business need not always receive high priority. A bill helping Microsoft aids the family business of Bill Gates, but we might properly view an argument that it helps a family business with suspicion.

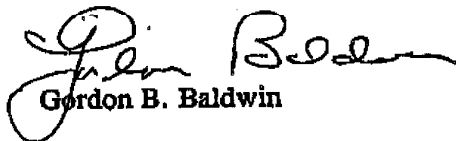
Governor Tommy Thompson  
September 21, 1999  
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I can not say whether a court might declare the law, if passed, unconstitutional. I do conclude that the proposal offends free market principles that underlie a lot of constitutional law forbidding states from interfering with interstate commerce. It is also vulnerable to attack on the ground that it impairs the contractual discretion of suppliers. Suppliers participate in an already heavily regulated industry and hence defenders will argue that participants know that government might intervene in their market. I expect, however, a court might view the proposal with suspicion because it bears heavily on the contractual discretion of many out-of-state enterprises. Conversely the proposal benefits a handful of Wisconsin based wholesalers. In this respect the proposal reeks of economic protectionism. Constitutional law flunks many laws promoting economic protectionism. Even if this proposal does not violate constitutional principles it clearly violates the norms underlying those principles.

You might hear the claim that the proposal gives wholesalers no more protection than enjoyed by tenured faculty. That analogy seems apt, but the positions differ. Faculty tenure policies really rest on preserving the speech (i.e. First Amendment) rights of teachers. Wholesalers have no such expectations. Indeed I have not heard of any legal claims made by wholesalers that require such monumental protection as supplied by the proposed legislation.

If a problem exists requiring government intervention to protect one side of a commercial relationship we should have hearings to expose the problem. Thereafter we might carefully drafted laws focusing on repairing the problems.

Sincerely,



Gordon B. Baldwin

D-Note

**ASSEMBLY AMENDMENT ,  
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,  
TO 1999 ASSEMBLY BILL 133**

1 At the locations indicated, amend the substitute amendment as follows:

2 1. Page 1139, line 11: after that line insert:

3 <sup>e 70</sup>  
4 "SECTION 2166~~7~~. 135.02 (3) of the statutes is renumbered 135.02 (3) (intro.) and  
amended to read:

5 135.02 (3) (intro.) "Dealership" means a any of the following:

6 (a) A contract or agreement, either expressed or implied, whether oral or  
7 written, between 2 or more persons, by which a person is granted the right to sell or  
8 distribute goods or services, or use a trade name, trademark, service mark, logotype,  
9 advertising or other commercial symbol, in which there is a community of interest  
10 in the business of offering, selling or distributing goods or services at wholesale,  
11 retail, by lease, agreement or otherwise.

12 <sup>m 30</sup>  
SECTION 2166~~7~~. 135.02 (3) (b) of the statutes is created to read:

*as defined in s. 125.02(21),*

1 135.02 (3) (b) A contract or agreement, either expressed or implied, whether  
2 oral or written, between <sup>2 or more persons</sup> ~~an intoxicating liquor manufacturer, as defined in s. 125.02~~  
3 ~~(10), and a wholesaler~~ <sup>by which</sup> ~~contract or agreement~~ a wholesaler is granted the  
4 right to sell or distribute intoxicating liquor <sup>as defined in s. 125.02(8),</sup> or use a trade name, trademark, service  
5 mark, logotype, advertising or other commercial symbol related to intoxicating  
6 liquor.

7 **SECTION 2166e.** 135.02 (5g) of the statutes is created to read:

8 135.02 (5g) "Intoxicating liquor" has the meaning given in s. 125.02 (8).

9 **SECTION 2166g.** 135.02 (5r) of the statutes is created to read:

10 135.02 (5r) "Net revenues" means the gross dollar amount received from the  
11 sale of intoxicating liquor minus adjustments for returns, discounts and allowances.

12 **SECTION 2166L.** 135.02 (7) of the statutes is created to read:

13 135.02 (7) "Wine" has the meaning given in s. 125.02 (22).

14 **SECTION 2166n.** 135.026 of the statutes is created to read:

15 **135.026 Legislative findings relating to intoxicating liquor**  
16 **dealerships.** The legislature finds that a balanced and healthy 3-tier system for  
17 distributing intoxicating liquor is in the best interest of this state and its citizens;  
18 that the 3-tier system ensures a balanced and level system between the grantor and  
19 wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is  
20 necessary for a balanced and healthy system; that the number of intoxicating liquor  
21 wholesalers in this state is in decline; that this decline threatens the health and  
22 stability of the wholesale tier; that the regulation of all intoxicating liquor  
23 dealerships is necessary to promote and maintain a wholesale tier consisting of  
24 numerous healthy competitors; and that the maintenance and promotion of the  
25 3-tier system will promote the public health, safety and welfare. The legislature

*regardless of when they were entered into,*

1 further finds that a stable and healthy wholesale tier provides an efficient and  
2 effective means for tax collection. The legislature further finds that dealerships  
3 between intoxicating liquor wholesalers and grantors have been subject to state  
4 regulation since the enactment of the 21st Amendment to the U.S. Constitution and  
5 that the parties to those dealerships expect changes to state legislation regarding  
6 those dealerships.

7 **SECTION 2166p.** 135.027 of the statutes is created to read:

8 **135.027 Liability of transferee of intoxicating liquor grantor.** (1) In this  
9 section:

10 (a) "Goodwill" includes the use of a trademark, trade name, logotype or other  
11 commercial symbol, and the use of a variation of a trademark, trade name, logotype,  
12 advertisement or other commercial symbol.

13 (b) "Transferee" means a person who acquires any asset or activity of a  
14 grantor's intoxicating liquor business and who uses the goodwill associated with the  
15 grantor's brand of intoxicating liquor.

16 (2) A transferee is considered a grantor for the purposes of this chapter and is  
17 considered to have assumed the transferor's dealership with the wholesaler of that  
18 brand.

19 **SECTION 2166r.** 135.03 of the statutes is renumbered 135.03 (1) and amended  
20 to read:

21 **135.03 (1)** ~~No~~ Subject to sub. (2), no grantor, directly or through any officer,  
22 agent or employe, may terminate, cancel, fail to renew or substantially change the  
23 competitive circumstances of a dealership agreement without good cause. The  
24 burden of proving good cause is on the grantor.

25 **SECTION 2166u.** 135.03 (2) of the statutes is created to read:



1 135.03 (2) A ~~change in the~~ <sup>transfer of the</sup> ownership or management of an intoxicating liquor  
2 wholesaler, as defined in s. 125.02 (21), is not good cause for a grantor to terminate,  
3 cancel, fail to renew or substantially change the competitive circumstances of its  
4 dealership with that wholesaler if the ~~changed~~ <sup>transferred</sup> ownership or management meets the  
5 grantor's reasonable and material qualifications in effect at the time of the change  
6 for intoxicating liquor dealerships. Insert 4-6

7 **SECTION 2166y.** 135.07 (4) of the statutes is created to read:

8 135.07 (4) To a dealership involving the wholesaling of intoxicating liquor if  
9 any of the following apply:

10 (a) The grantor, including any affiliate, division or subsidiary of the grantor,  
11 has never produced more than 200,000 gallons of intoxicating liquor in any year.

12 (b) The dealer's net revenues from the sale of the grantor's brands of  
13 intoxicating liquor <sup>, except wine,</sup> constitute less than 5% of the dealer's total net revenues from the  
14 sale of intoxicating liquor <sup>, except wine,</sup> during the dealer's previous fiscal year and the dealer's net  
15 revenues from the sale of the grantor's brands of wine constitute less than 5% of the  
16 dealer's total net revenues from the sale of wine during the dealer's previous fiscal  
17 year.”.

18 **2.** Page 1607, line 22: after that line insert:

19 “(6g) INTOXICATING LIQUOR DEALERSHIPS. The renumbering and amendment of  
20 sections 135.02 (3) and 135.03 of the statutes and the creation of sections 135.02 (3b),  
21 (5g), (5r) and (7), 135.03 (2) and 135.07 (4) of the statutes take effect retroactively to  
22 October 1, 1998.”.

(END)

22  
Insert  
23  
4-22

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

2 ins.  
LRBb1774/1 ins  
RNK: ~~66666~~

Insert 4-22

21665

SECTION ~~135~~ 135.066 of the statutes is created to read:

**135.066 Intoxicating liquor dealerships.**

(1) LEGISLATIVE FINDINGS ~~RELATING TO INTOXICATING LIQUOR DEALERSHIPS~~ The legislature finds that a balanced and healthy 3-tier system for distributing intoxicating liquor is in the best interest of this state and its citizens; that the 3-tier system ensures a balanced and level system between the ~~manufacturer~~ <sup>manufacturer</sup> and wholesale tiers; that a wholesale tier consisting of numerous healthy competitors is necessary for a balanced and healthy <sup>3-tier</sup> system; that the number of intoxicating liquor wholesalers in this state is in decline; that this decline threatens the health and stability of the wholesale tier; that the regulation of all intoxicating liquor dealerships, regardless of when they were entered into, is necessary to promote and maintain a wholesale tier consisting of numerous healthy competitors; and that the maintenance and promotion of the 3-tier system will promote the public health, safety and welfare. The legislature further finds that a stable and healthy wholesale tier provides an efficient and effective means for tax collection. The legislature further finds that dealerships between intoxicating liquor wholesalers and ~~wholesalers~~ <sup>manufacturers</sup> have been subject to state regulation since the enactment of the 21st Amendment to the U.S. Constitution and that the parties to those dealerships expect changes to state legislation regarding those dealerships.

(2) DEFINITIONS. In this section:

(a) Notwithstanding s. 135.02(3), "dealership" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons by which a wholesaler is granted the right to sell or distribute intoxicating liquor or use

1 a trade name, trademark, service mark, logotype, advertising or other commercial  
2 symbol related to intoxicating liquor.

3 ~~(b)~~ <sup>(a)</sup> "Intoxicating liquor" has the meaning given in s. 125.02 (8). ✓

4 ~~(b)~~ <sup>(b)</sup> "Net revenues" means the gross dollar amount received from the sale of  
5 intoxicating liquor minus adjustments for returns, discounts and allowances.

6 ~~(d)~~ <sup>(c)</sup> "Wholesaler" has the meaning given in s. 125.02 (21). ✓

7 ~~(e)~~ <sup>(d)</sup> "Wine" has the meaning given in 125.02 (22). ✓

8 (3) LIABILITY OF TRANSFEREE OF INTOXICATING LIQUOR GRANTOR. (a) In this  
9 subsection:

10 1. "Goodwill" includes the use of a trademark, trade name, logotype or other  
11 commercial symbol, and the use of a variation of a trademark, trade name, logotype,  
12 advertisement or other commercial symbol.

13 2. "Transferee" means a person who acquires any asset or activity of a grantor's  
14 intoxicating liquor business and who uses the goodwill associated with the grantor's  
15 brand of intoxicating liquor.

16 (b) A transferee is considered a grantor for the purposes of this chapter and is  
17 considered to have assumed the transferor's dealership with the wholesaler of that  
18 brand.

19 (4) CHANGE IN OWNERSHIP. (a) In this subsection, "successor wholesaler" means  
20 a wholesaler who succeeds to the management, ownership or control of a wholesaler  
21 or wholesaler's business.

22 (b) A change in the management, ownership or control of a wholesaler or  
23 wholesaler's business is not good cause for a grantor to terminate, cancel, fail to  
24 renew or substantially change the competitive circumstances of its dealership with  
25 a successor wholesaler if the successor wholesaler meets the grantor's reasonable

1 and material qualifications for dealerships in effect at the time of the change. If the  
2 successor wholesaler meets the grantor's reasonable and material qualifications for  
3 dealerships in effect at the time of the change, the successor shall succeed to the  
4 dealership rights of the predecessor wholesaler and the grantor shall continue to be  
5 bound by the dealership.

6 (5) NONAPPLICABILITY. This chapter does not apply to any of the following  
7 dealerships:

8 (a) Dealerships in which a grantor, including any affiliate, division or  
9 subsidiary of the grantor, has never produced more than 200,000 gallons of  
10 intoxicating liquor in any year.

11 (b) Dealerships in which the dealer's net revenues from the sale of the grantor's  
12 brands of intoxicating liquor, except wine, constitute less than 5% of the dealer's total  
13 net revenues from the sale of intoxicating liquor, except wine, during the dealer's  
14 previous fiscal year and the dealer's net revenues from the sale of the grantor's  
15 brands of wine constitute less than 5% of the dealer's total net revenues from the sale  
16 of wine during the dealer's previous fiscal year.

17 (6) SEVERABILITY. The provisions of this section are severable as provided in s.  
18 990.001 (11)."

19 ~~Page 1586, line 24: after that line insert: stat. upper~~  
20 ~~"(2)(a) INTOXICATING LIQUOR DEALERSHIPS. The treatment of section 135.066 of the~~  
21 ~~statutes first applies to dealerships in effect on October 1, 1998."~~

initial  
cpg  
the renumbering and amending of  
section 135.02(3) ~~was~~ of the  
statutes <sup>and</sup> the creation of section  
135.02(3)(b) of the statutes ~~add~~ ment

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

2dn  
LRBb1774/105

RNK:cmh:km

c  
PEN

DATE

1. I have attempted in this redraft to address most of the concerns contained in your redraft instructions as contained in the memo you furnished from Eric Peterson. I did, however, make some changes to the legislative findings statement. The statement, as provided, uses the phrases "for over 60 years" and "the past two decades". It is inappropriate to use such references in the statutes because with the passage of time, those references become inaccurate. Consequently, I did not include that language.

2. I changed the effective date provision to an initial applicability provision. The provision now provides that all of s. 135.066 as created in the draft first applies to dealerships in effect on October 1, 1998. I think this achieves the intent of the request but please let me know if it does not.

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: Robin.Kite@legis.state.wi.us

Do you want to specify a remedy for a "dealership" that was terminated without "good cause" and that was subsequently transferred to a second wholesaler, or should the courts decide this on a case-by-case basis? I don't know whether a manufacturer may take a "dealership" away from the current wholesaler, in order to restore it to the previous wholesaler, without impairing the current wholesaler's rights under this legislation.

-PEN

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRBb1774/2dn  
RNK&PEN:cmh:mrc

September 30, 1999

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Paul E. Nilsen  
Legislative Attorney  
Phone: (608) 261-6926